No. 20241

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ELRANCO, INC., a Nevada corporation, EL RANCO HOTEL OPERATING CO., a Nevada corporation, BELDON R. KATLEMAN, MCA ARTISTS, LTD., a Delaware corporation, ROY GERBER and MATT GREGORY,

Appellants,

vs.

RENE BARDY,

Appellee.

REPLY BRIEF OF APPELLANTS ELRANCO, INC., EL RANCO HOTEL OPERATING CO. AND BELDON R. KATLEMAN.

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Preliminary Statement.

This Reply Brief is intended to reply only to those matters contained in Appellee's Brief which Appellants feel are not adequately dealt with in their opining brief.

I.

Reply to Appellee's Answer to Point 1 A (Appellee's Brief 120-128).

The decisions of this Court cited by appellee (Appellee's Br. p. 121), holding that normally weight is accorded to a determination by the trial judge upon state law wherein he sits, have no application here. *People of the State of California v. United States* (9th Cir. 1956),

235 F. 2d 647, 654; *Citrigno v. Williams* (9th Cir. 1958), 255 F. 2d 675, 679; *Grabner v. Willys Motors, Inc.* (9th Cir. 1960), 282 F. 2d 644, 647. As this Court indicated in the *California* case, its deference to the interpretation of the trial judge therein was based upon the fact that the judge was "a lawyer of the state of long standing, acquainted with the imponderables and implications inherent in the pronouncement of the courts of the state." No such situation prevailed below. To the knowledge of the writer, the learned trial judge had never previously sat in Nevada. There is a statute involved which appellants urge is clear and unequivocal and even if this Court should disagree, there exists no reason whatsoever to defer to the construction thereof given by the Court below.[1]

The contention (Appellee's Br. p. 123) that the fictitious name statute should be construed to require conducting, carrying on or transacting business at the time of commencement of the action because NRS 602.010 is in the present tense, has no merit. That section requires persons coming within its purview to file the fictitious name certificate. NRS 602.070 enjoins suit if there has not been compliance. The construction urged by appellee would in effect nullify the statute by permitting a person to avoid the injunction of the statute by the simple expedient of ceasing to use the fictitious name at the time suit is commenced upon a transaction arising under such name. Such a construction is not required by the statute, its purpose or common sense.

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[1]It is noteworthy that on page 127 of Appellee's Brief, appellee calls this Court's attention to the fact that the trial judge advised the parties during trial that he was not familiar with prevailing legal thought on the interpretation of the statute and the outcome of that issue would be a contingent development in the appellate litigation, if any.

II.

Reply to Appellee's Answer to Point 1 B (Appellee's Brief 129-136).

Appellee has answered appellants' argument that appellee is estopped to deny that La Nouvelle Eve Corporation is a corporation on the basis that the evidence supports a finding that appellee executed the original contract in his individual capacity and not on behalf of a separate legal entity. Appellee cites no authority in opposition to that of appellants on the estoppel doctrine. Appellee claims there existed a latent ambiguity in the original contract and additional information had to be supplied to show the ambiguity. As authority appellee cites one decision only dealing with identify of a contracting party, *M & J Diesel Locomotive Filter Corp. v. Nettleton* (1965), 56 Ill. App. 2d 146, 205 N.E. 2d 659.

In that case a lease and rider were prepared by the lessor and the place provided for the lessee to sign both contained signature lines describing the lessee as "Eugene M. Nettleton, d/b/a Midwest Building Supply by ....." Nettleton signed the lease and rider on the respective signature lines. There was no place for an attestation by a corporate secretary except opposite the lessor's signature line. The corporate secretary of the lessee did attest on that line on both the lease and rider. The lessee was a corporation, it carried on the corporate business on the demised premises and paid all rentals under the lease by corporate check. It was there held that as the identity of the lessee was not clear, extrinsic evidence was admissible.

Here, the December 1, 1958 contract stated that the artist was La Nouvelle Eve Corporation and it was

signed "P.P.R. Bardy". [Ex. D.][2] On the AGVA form comprising the first page of the agreement it states that La Nouvelle Eve Corporation is "hereinafter called the 'Artist'" and in the rider it states "La Nouvelle Eve Corporation, hereafter referred to as artist." It provides that under the agreement all monies are payable to La Nouvelle Eve Corporation.

The March 6, 1959 contract provides that it is an "amendment to contract and riders dated December 1, 1959 (*sic*) between La Nouvelle Eve Corporation, Artist, and El Rancho Operating Company, Operator." It is signed "La Nouvelle Eve Corporation by R. Bardy". [Ex. 472.]

If a party could validly contend La Nouvelle Eve Corporation was not the contracting party, no contracting party could ever have any assurance as to whom he is dealing with and the large body of law dealing with the doctrine of estoppel to deny corporate existence would have no justification for its existence.

Appellee pounces upon an isolated letter by Katleman to AGVA which refers to the March 6, 1959 contract as a letter agreement between Hotel and "Mr. Bardy" as being a practical construction by Katleman that the original contract was signed by appellee in an individual capacity. (Appellee's Br. p. 132.) That letter can have no meaning for construction purposes, even assuming extrinsic evidence was admissible, as everything else in this voluminous record demonstrates that everyone, including appellee, considered the contracting party to be La Nouvelle Eve Corporation. (Appellants' Br. pp. 49-

[2]Appellee's Brief wholly ignores the significance of his use of "P.P."

51.) Typical is the letter of April 24, 1959 to AGVA seeking money deposited by Hotel for return transportation, which uses "we" throughout, is signed only "La Nouvelle Eve Corporation," and states that "according to our contract with El Rancho Vegas, this management had no right to pay money due to our company to anyone without our authorization". [Ex. N.]

On page 134 of Appellee's Brief, appellee contends that appellants have "seized" upon some different Conner letter to show that appellee wrote Conner after March 6, 1959 as to whether La Nouvelle Eve Corporation was a valid corporation. Appellee refers to no such different Conner letter in the evidence. Appellee's letter [Ex. 157] is entirely responsive to the Conner letter of March 2, 1959. [Exs. M-M-1.] "2-3-59" is the usual European way of indicating March 2, 1959. [Exs. 209, 473.][3] And appellants did state that Exhibit 157 was "probably sent before he returned to Paris on March 6th". (Appellants' Op. Br. p. 50.)

Appellee's contention that the jury could conclude that appellee's reference to AGVA in Exhibit 157 could have been the collective bargaining agreement between La Nouvelle Eve Corporation and AGVA [Ex. 105] is without basis. That agreement was executed on January 15, 1959, long after the December 1, 1958 contract was executed.

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[3]Part of Exhibit 473 is a telegram from appellee to Gerber. In reading the telegram to the jury appellee's counsel said: "It reads: '12/3/59,' which, I believe, your Honor, is March 12, 1959. They reverse their numbers. If we could stipulate for the record." Such stipulation was made. [T. 253, lines 8-20].

III.

Reply to Appellee's Answer to Point II B (Appellee's Brief 137-139).

Appellee (Appellee's Br. p. 137) argues that the "jury could reasonable infer from the evidence that Bardy owned the nightclub and that the societies that exploited the nightclub were licensees" and therefore appellants were not entitled to an instruction that appellee did not own the nightclub. Appellee's own evidence is that Mansart, a corporation, owned the nightclub and it was always run by a succession of societies. Appellee has not called this Court's attention to any evidence otherwise and appellants were entitled to the requested instruction.

Appellee (Appellee's Br. p. 138) contends appellants' objection to the instruction was based upon a different reason from that set forth in appellants' brief. Appellants submit that no inconsistency exists and that Court and counsel were well aware of the basis for appellants' request. [T. p. 3215, line 25, to p. 3217, line 25.]

IV.

Reply to Appellee's Answer to Point III (Appellee's Brief 139-142).

Appellants' objection to admission of the assignments was proper. They were inadmissible because under Nevada law they were executed after the commencement of the action. *Thelin v. Intermountain Lumber*, 80 Nev. 285, 392 P. 2d 626 (1924). That decision is a flat holding that under Nevada law an assignee has no claim unless the assignment was executed prior to commencement of the action.

Whether the assignments executed after commencement of the action relate back is a matter of state sub-

stantive law and not a matter of procedure as urged by appellee. *Boeing Airplane Company v. Perry* (10th Cir. 1963), 322 F. 2d 589; *Texas San Juan Oil Corp. v. An-Son Offshore Drilling Co.* (D.C. N.Y. 1961), 194 F. Supp. 396; *Strate v. Niagara Machine and Tool Works* (S.D. Ind. 1958), 160 F. Supp. 296; *Wright v. Schebler Co.* (D.C. Iowa, 1965), 37 F.R.D. 319.

Moore's Federal Practice, Vol. 3, page 1305, states:

> "The meaning and object of the real party in interest provision would be more accurately expressed if it read:
>
> 'An action shall be prosecuted in the name of the party who, by the substantive law, has the right sought to be enforced.' "

That the assignment question is a substantive one and not procedural is manifest. Indeed it is hard to conceive of anything of a more substantive nature than the question of whether or not a party has a claim.

Pioche Mines Consolidated, Inc. v. Dolman (9th Cir. 1964), 333 F. 2d 257, does not aid appellee. There, additional plaintiffs were added to a lawsuit after commencement.[4] Here, no new plaintiffs were added, but rather, appellee, by the assignments, sought to create a right of action in himself retroactively, and under Nevada law, which applies, he could not do so.

Appellee contends (Appellee's Br. p. 142) appellants should have requested an instruction limiting the purpose of the assignments. As they were not admissible for any purpose, appellants are at a loss to understand such contention.

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[4]Appellee is inaccurate when he states that Plaintiff in the *Pioche Mines* suit was not a shareholder at the time the transactions complained of occurred. Rather he had failed to allege his stockholder status and amendment was permitted because Rule 23(b) requirements are not jurisdictional.

V.

Reply to Appellee's Answer to Point IV (Appellee's Brief 146-148).

The only credible evidence in the record with respect to payment for transportation is the receipt dated January 15, 1959, by Icelandic Airlines to MCA "as agent on behalf of La Nouvelle Eve Corporation" for the $12,000.00 advanced by Hotel [Ex. Q], and subsequently the Hotel paid $10,000.00 for the return transportation. [T. p. 2135, line 12, to p. 2139, line 2; Haettel Ex. D.] That no money was paid by appellee is confirmed by the letter from Icelandic to appellee dated February 16, 1959. [Ex. MS.]

The records kept by Conner were admissible as evidence as records made in the regular course of business. 28 U.S.C.A. 1732. Appellee testified the bills were presented to Conner. [T. p. 1272, lines 5-8.] Conner reflected them in his records. As a result, wholly apart from the $10,000.00 advanced by the Hotel for return transportation, there was no money due La Nouvelle Eve Corporation under the December 1, 1958 agreement.

VI.

Reply to Appellee's Answer to Point VII A (Appellee's Brief 148).

The tax returns referred to by appellee were in French and were never offered by appellee. Appellants submit that the fact that such exhibits were marked affords appellee no solace. He offered no financial records whatsoever. Appellee's self-serving statements, over valid foundation objections, that he spent "about" $250,000.00 since 1956 for the show is not credible evidence. [T.

p. 1307, line 19, to p. 1308, line 12.][5] Appellee's March letter to Conner [Ex. 157] demonstrates the untruthfulness of appellee's testimony. In the letter he tells Conner his expenses were $1,000 and Paris costs were $2,500. Those Paris costs included "Authors' rights, copyrights, costume costs, shoes, wigs, hats, rehearsals, music, etc."

In any event, appellee's testimony does not satisfy the requirement of Nevada law that there "must be substantial evidence as to the amount of damage, as the law does not permit arriving at such amount by conjecture." *Alper v. Stillings*, 80 Nev. 84, 87, 389 P. 2d 239, 240 (1964).

VII.

Reply to Appellee's Answer to Point IX (Appellee's Brief 152-156).

Appellee contends that appellants claim of deprivation of a fair trial was an afterthought. Not only did appellants ask for a mistrial, but appellants felt the damage was irreparable and insisted on preserving their position and refused to be privy to an attempted corrective instruction. [T. p. 1345, lines 12-25.]

During the cross-examination of appellee, appellants' counsel frequently protested actions of the trial judge. (Appellants' Br. A-4, A-6, A-10, A-11, A-12, A-13, A-17, A-21, A-26, A-27, A-39, A-43.)

Appellants also submit that there is little for counsel to do when the following occurs:

> "The Court: How much longer do you estimate you will be, Mr. Lionel?

[5]The Court requested Appellee's counsel to ask appellee ". . . how much he had invested."

Mr. Lionel: At least a day, your Honor.

The Court: No you won't, I will give you tomorrow morning at the outside. . . ." [T. p. 1441, lines 21-25.]

and

"The Court: Have you about concluded?

Mr. Lionel: I would say I have about 30 or 40 minutes more, your Honor.

"The Court: No. It is 1:00 o'clock now. We will take the recess, and boil it down to ten minutes." [T. p. 1565, lines 2-6.]

What kind of protest or objection can counsel make under such circumstances. Appellants strongly urge this Court to read the entire cross-examination of appellee. It comprises only a portion of Volume VI of the Transcript. Such reading will demonstrate the many difficulties counsel had because of the conduct of appellee's counsel and the Court. It will also demonstrate that appellants' counsel treated the trial judge with the utmost respect at all times and does not now intend otherwise, and the argument on this issue is not intended to be an "attack" on the trial judge as appellee characterizes it.

On page 154, appellee accuses this writer of "attempting to manipulate the translation" with respect to the use of the word "corporation".[6] Appellee's citations to

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[6]Appellee's counsel himself used the word "corporation" in his direct examination of appellee.

"Q. Did you do anything about a Monte Carlo corporation?

"A. Certainly, right away.

". . .

"Q. What else did you do as to a Monte Carlo corporation?

"A. The new corporation was — I called it the New Company, the La Nouvelle Eve Corporation." [T. p. 1144, line 25, to T. p. 1145, line 15].

the record in support of that charge are also during appellee's cross-examination. A reading of that portion of the record demonstrates appellee's charge is wholly unfounded.

Conclusion.

The judgment should be reversed.

Respectfully submitted,

SAMUEL S. LIONEL and
LEO K. GOLD,
By SAMUEL S. LIONEL,
Attorneys for Appellants Elranco, Inc., El Ranco Hotel Operating Co., and Beldon R. Katleman.

Certificate.

I certify that in connection with the preparation of this brief I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

SAMUEL S. LIONEL